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IN THE

SUPREME COURT OF THE UNITED STATES

October Term

No. 76-1755

L. J. HOLLENBACH, III, County Judge of Jefferson County, Kentucky - - - Petitioner

versus

JOHN E. HAYCRAFT, Et Al. - - Respondents

versus

BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - Respondents

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BRIEF FOR RESPONDENTS HAYCRAFT, ET AL. IN OPPOSITION

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BOARD OF EDUCATION OF JEFFERSON COUNTY, KENTUCKY, Et Al. - *Respondents*

BRIEF FOR RESPONDENTS HAYCRAFT, ET AL. IN OPPOSITION

The Respondents, John E. Haycraft, et al., oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

Both the Sixth Circuit Order of March 11, 1977, dismissing the appeal as unsubstantial and the District Court's opinion of May 18, 1976, are unreported and appear in the Petition.

QUESTIONS PRESENTED

1. When a federal district court has approved and implemented a desegregation plan that succeeds in eliminating all vestiges of state-imposed segregation, and an intervening party proposes a desegregation plan that does not provide for the desegregation of racially identifiable black schools, on the premise that white parents will refuse to send their children to such schools, whether the court abuses its discretion in refusing to replace the former plan with the plan proposed by the intervening party.

2. When a school district located in a state where racial segregation was required by state law has failed to convert to a unitary system and has maintained a large number of racially identifiable schools, whether a federal district court exceeds its remedial powers by ordering a desegregation plan that eliminates all racially identifiable black schools within the district.

STATEMENT OF THE CASE

The Statement of the Case submitted by the Petitioner does not give the complete history of the present case, and fails to discuss the matter of the merger of the former Louisville school district with the Jefferson County district into a consolidated district. It also misrepresents the holding of the Sixth Circuit when this case was first before it. *Newburg Area Council, Inc.* v. *Board of Education of Jefferson County, Kentucky*, 489 F. 2d 925 (6th Cir., 1973). The respondents will endeavor to set forth the complete history of the

case and to correct the Petitioner's omissions and misrepresentations.

In this case the Respondents sought a determination that both the former Louisville school district and the Jefferson County district had failed to eliminate all vestiges of state-imposed segregation from their districts and further sought the imposition of an inter-district desegregation plan. Based on the undisputed evidence presented in the District Court, the Sixth Circuit found that both districts had failed to eliminate all vestiges of state-imposed segregation and that in the circumstances of this case, inter-district relief was appropriate. With respect to Jefferson County, the Sixth Circuit found that the district had maintained Newburg, a pre-Brown black school, as a black school to the present time, and in addition, that it was maintaining two later-constructed schools, Price and Cane Run, as racially identifiable black schools. Although only 4% of the students enrolled in the Jefferson County district were black, these three elementary schools contained 56% of those students. 489 F. 2d at 928.

In the Louisville district, where approximately 50% of the students were black, the Court found the same situation that this Court found present in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and based its holding on *Swann*. It found that five of the six senior high schools, nine of the thirteen junior high schools and forty of the forty-six elementary schools were racially identifiable schools.[1]

[1]Three of the senior high schools, five of the junior high schools, and nineteen of the elementary schools were racially identifiable black schools. Only nineteen of the district's sixty-five schools were not racially identifiable.

Fifty-six of the district's schools were pre-*Brown* schools, and of these, thirty-five had never changed their racial composition.[2] Only nine schools had been constructed since *Brown*, six of which were racially identifiable with respect to student composition upon opening. 489 F. 2d at 930-931. The Court, applying the principles set forth by this Court in *Swann* to determine whether a district located in a state where school segregation was required by state law had converted to a unitary system, held that the large number of racially identifiable schools gave rise to a presumption that all vestiges of state-imposed segregation had not been eliminated. The burden then shifted to the school district to show that the racial composition of the schools, particularly the 35 pre-*Brown* schools that had not changed their racial composition, was not the result of past discriminatory action on its part, and as the Court noted, "This it has not done." 489 F. 2d at 931.

The Court also held that in the circumstances of this case, an inter-district remedy was necessary and prior to eliminate fully all vestiges of state-imposed segregation in both districts. 489 F. 2d at 932. Its holding on this point was vacated by this Court and the case remanded for reconsideration in light of *Milliken* v. *Bradley*, 418 U. S. 717 (1974); at 418 U. S.

[2]Although this point was not noted in the opinion, the record reveals that twenty-five of these schools were pre-*Brown* white schools and ten were pre-*Brown* black schools. Of the remaining twenty-one pre-*Brown* schools, nine were not racially identifiable. Twelve pre-*Brown* white schools had become racially identifiable black schools. All of these schools were located in the central and western portions of the district, and were built, generally, in close proximity to the black schools, to serve whites residing there. As the black population expanded in the central city and westward after Brown, these schools became racially identifiable black schools.

918 (1974). Upon reconsideration, the Sixth Circuit held that in light of the principles set forth in *Milliken*, an inter-district remedy was appropriate in the circumstances of this case. 510 F. 2d 1358 (6th Cir. 1974). Following that decision, the Louisville Board of Education instituted proceedings for the merger of the Louisville and Jefferson County districts, in accordance with Kentucky law, and on April 1, 1975, the Kentucky Board of Education ordered the merger of the two districts. Certiorari to review the judgment of the Sixth Circuit was denied by this Court. 421 U. S. 931 (1975).

When the District Court considered the adoption of a desegregation plan to eliminate all vestiges of state-imposed segregation in this case, it looked to Jefferson County as a whole rather than to the previously-separate Louisville and Jefferson County school districts, both because the Sixth Circuit had held that the imposition of an inter-district remedy was proper here and because the districts had now been merged.[3] The District Court rejected the desegregation plans that had been submitted to it and formulated its own desegregation plan. That plan focused on eliminating all of the racially identifiable black schools in Jefferson County. Since the black population of Jefferson County was approximately 20%, the District Court concluded that the black enrollment in any elementary school should not exceed 40%, and the black enrollment in any junior or senior high school should not exceed 35%. This plan required the assignment of a sub-

[3]Under Kentucky law, upon merger, the Jefferson County district succeeded to the rights and liabilities of the Louisville district.

stantial number of white students to formerly black schools, and the concomitant assignment of a substantial number of black students to formerly white schools. The Court also decreed that the black enrollment in the schools to which black students were assigned should not be less than 12% on the elementary school level, and 12.5% on the junior high school and senior high school level. Schools that had a black enrollment within these guidelines were exempt from reassignment. The reassignment required the busing of a number of black and white students, although, as the Court stated, it had endeavored to limit busing to the minimum that was necessary for the effective implementation of the plan. All of the schools within the school district were effectively desegregated under the Court's plan.

The school district contended on its appeal from the desegregation order that the desegregation was "excessive", both because it operated county-wide, and because it did not leave any schools with a black majority, the same contentions that are made by the present petitioner. These contentions were rejected by the Sixth Circuit, which affirmed the actions of the District Court, in all respects. *Cunningham* v. *Grayson*, 541 F. 2d 538 (6th Cir. 1976). Certiorari was denied by this Court. —— U. S. ——, 97 S. Ct. 812, *rehearing den.*, ——U. S. ——, 97 S. Ct. 1573 (1977).

The District Court had permitted the County Judge of Jefferson County, the president Petitioner, to intervene in the proceedings for the sole purpose of present-

ing an alternative desegregation plan.[4] Such a plan, prepared by Dr. James S. Coleman, who, according to the Petitioner, has now emerged as an opponent of busing, was presented to the Court, and a hearing was held on the plan on May 4, 1976. The plan provided for the desegregation of the three racially identifiable black elementary schools in the former Jefferson County district, but did not provide for the desegregation of the twenty-seven racially identifiable black schools in the former Louisville district. Black children attending those schools would be permitted to transfer to white schools within limits, and white children would be permitted to transfer to those schools. The reason why white children could not be compulsorily assigned to the racially identifiable black schools, according to Dr. Coleman, was that white parents would refuse to permit their children to attend schools located in black residential areas, as these schools generally were, and would withdraw their children from the public schools.[5]

[4]There is a serious question as to whether a constitutional case or controversy is presented between the Petitioner and the Respondents. The Petitioner, currently seeking re-election, claims to represent "all the people of Jefferson County," and his claim in that regard is indistinguishable from the claim of a state to represent its citizens, which ever since *Massachusetts* v. *Mellon*, 262 U. S. 447 (1923), this Court generally has found insufficient to present a case or controversy.

[5]Dr. Coleman was dead wrong in his dire prophecy. White parents in Jefferson County have sent their children to the former black schools, which are now no longer racially identifiable, and the black-white ratio of the Jefferson County school district is substantially the same today as it was at the start of the 1975-6 school year, when the plan was first implemented. Desegregation has worked in Jefferson County, and in Jefferson County, there are no longer black schools or white schools, just *schools* attended by children of both races. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 442 (1968).

When counsel for the plaintiffs asked Dr. Coleman how the plan would eliminate racially identifiable black schools, Dr. Coleman responded as follows:

> "The plan does nct eliminate racially identifiable black schools, and I think no plan that is stable can do so, nor do I think it is proper—I think it is not a proper objective, because I think it's racially discriminatory." (Tr. Vol. IV, p. 84).

At this point the Court interrupted the examination and asked the witness a few questions of its own. Counsel for the plaintiffs then renewed the Motion to dismiss the intervention, which had been made earlier. After hearing arguments of counsel for both sides, and after hearing additional testimony from Dr. Coleman, in which he reaffirmed his view that white parents would not send their children to schools located in black residential areas, the Court granted the Motion. In so doing, it stated that it had been directed by the Sixth Circuit to eliminate all vestiges of state-imposed segregation, and as it concluded:

> "Now, as I see it, *there is no way to remove those vestiges* except to strike down those situations that exist in previously all black schools which do not destroy the racial identity of those schools." (Tr. Vol. IV, p. 97). (Emphasis added.)

The Petitioner appealed the dismissal to the United States Court of Appeals for the Sixth Circuit, which on March 11, 1977, dismissed the appeal as unsubstantial.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I

Present

The Posture in Which the Case Arises Makes It an Inappropriate Vehicle to Review the Validity of the District Court's Desegregation Plan.

The present case arises only because the District Court, over the repeated objections of the plaintiffs, permitted the Petitioner, in his capacity as County Judge of Jefferson County, to intervene for the purpose of presenting an alternative desegregation plan. Assuming that the case presents a constitutional case or controversy between the parties, the substantive claim of the Petitioner is that the District Court was required to accept his alternative desegregation plan. The petition for certiorari, however, essentially attacks the desegregation plan that the District Court approved and does not address the question of whether the alternative desegregation plan presented by the Petitioner is itself constitutionally permissible. The validity of the District Court's desegregation plan was litigated in a case between the parties directly involved in this litigation—the plaintiffs and the school district—and was upheld by the Sixth Circuit. *Cunningham* v. *Grayson,* 541 F. 2d 538 (6th Cir. 1976). Review was sought by the school district, and was denied by this Court. —— U. S. ——, 97 S. Ct. 812, *rehearing den.,* U. S. ——, 97 S. Ct. 1573 (1977). It would appear rather strange for this Court, having twice denied re-

view when sought by the school board just this last Term, to turn around and grant review when it was sought by a limited intervenor, who is a candidate for re-election to a political office that has no school related duties. What this case involves, in the posture in which it arises, is not the question of the validity of the District Court's desegregation plan—which presumably was settled in *Grayson*—but the question of whether the District Court, having approved and implemented a desegregation plan that succeeded in eliminating all vestiges of state-imposed segregation, was required to scrap that plan and approve the plan presented by the Petitioner. It certainly was not required to do so if the plan presented by the Petitioner was constitutionally defective on its face.

The Petitioner seeks to have this Court overturn the District Court's desegregation plan on the ground that it requires "too much desegregation." His standing to raise that question and to seek this Court's review of that plan, it is submitted, depends on whether he would receive any benefit from a decision overturning that plan, *Simon* v. *Eastern Kentucky Welfare Rights Organization,* 426 U. S. 26 (1976), and if his plan is itself constitutionally defective, he lacks standing to seek review of the District Court's plan.

In the view of both the District Court and the Sixth Circuit, the plan presented by the Petitioner was constitutionally defective on its face, and they could reach no other conclusion under the applicable law as declared by this Court. The premise of the Petitioner's plan is that the District Court could not order the de-

segregation of racially identifiable black schools, because white parents would be unwilling to send their children to those schools. Apart from the fact that this premise is racist in tenor and has been demonstrated empirically in Jefferson County to be patently fallacious, it invokes the legally indefensible and long-discredited "white flight" objection to desegregation. As this Court has emphasized, the fear of "white flight" cannot be accepted as a reason for achieving anything less than the complete uprooting of the dual school system. *United States* v. *Scotland City Board of Education,* 407 U. S. 484, 491 (1972). In a school district where racial segregation was required by state law, the desegregation plan must eliminate all vestiges of state-imposed segregation, *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and must achieve the greatest degree of actual desegregation, taking into account the practicalities of the situation. *Davis* v. *Board of School Commissioners,* 402 U. S. 33 (1971). A purported desegregation plan that does not try to desegregate racially identifiable black schools on the ground that white parents do not want their children to attend such schools is patently unconstitutional and defective on its face. It is a gratuitous insult to black-Americans—and demonstrates a degree of racism that is intolerable in a nation committed to racial equality.

Since the plan proposed by the Petitioner is constitutionally defective on its face, the Petitioner lacks standing to seek review of the validity of the District Court's desegregation plan. Even if that plan could be

challenged by an appropriate party on the ground that it requires "too much desegregation"—which it is submitted, it cannot—it cannot be challenged by the present Petitioner, because the Petitioner would derive no benefit from a declaration of its invalidity.[6] The District Court was clearly required, in view of the applicable decisions of this Court, to dismiss the Petitioner's plan out-of-hand, and since this is so, the present case cannot properly be used as a vehicle to review the validity of the District Court's desegregation plan.

II

This Case Presents No Substantial Question Calling for the Exercise of This Court's Discretionary Jurisdiction On Certiorari.

In *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U. S. 1 (1971), and *Davis* v. *Board of School Commissioners,* 402 U. S. 33 (1971), this Court set forth the criteria governing desegregation in school districts located in states where segregation was required by state law prior to *Brown.* In so doing, it emphasized that all vestiges of state-imposed segregation had to be eliminated in such districts and that the lower courts had broad discretion in formulating a plan that would achieve that objective. In the years since *Swann* it has consistently denied review in cases challenging the adequacy and validity of desegregation plans approved by the lower courts in such cases. See *e.g. Northcross* v. *Board of Education,* 416 U. S. 962

[6] With the possible exception that it may affect his political career.

(1974); *Medley* v. *School Board,* 414 U. S. 1172 (1974); *Goss* v. *Board of Education,* 414 U. S. 1171 (1974). It denied review and rehearing in the case at bar when it was sought by the school district. The present Petitioner had advanced no reasons showing why in this case this Court should depart from what appears to be its settled certiorari practice.

It is rather novel to see it argued after *Swann* that in a school district located in a state where racial segregation was required by state law, a decree that eliminates the racially identifiable character of the former black schools is beyond the remedial powers of a federal court because it orders "too much desegregation." It must be emphasized that here *all* of the racially identifiable black schools were found to constitute vestiges of state-imposed segregation. In the Jefferson County district prior to its merger with the Louisville district, there were three racially identifiable black schools, one of which was a pre-*Brown* black school, and two of which became racially identifiable at a time when the district had not yet converted to a unitary system. 489 F. 2d at 928-929. In the former Louisville district, there were twenty-seven racially identifiable black schools, ten of which were pre-*Brown* black schools that had never changed their racial composition, twelve of which were pre-*Brown* white schools located in close proximity to pre-*Brown* black schools in conformity to the requirements of state-imposed segregation, which became black at a time when the district had not yet converted to a unitary system, and five of which were opened as racially identifiable black

schools, again at a time when the district had not yet converted to a unitary system. With respect to all of these schools, the board made no effort to show that their racially identifiable character was not the result of past or present discriminatory action on its part, as it was required to do by *Swann*, 402 U. S. at 26. 489 F. 2d at 931. Thus, *all* of these schools were found to constitute vestiges of state-imposed segregation.

If the desegregation had been limited to the former Jefferson County district alone, in which the black student population was only 4%, it would have been sufficient to eliminate the racially identifiable character of the three black schools, which would have resulted in the desegregation of a number of white schools, but which would not have required the desegregation of a number of other white schools in the country.

But with the ordering of an inter-district remedy by the Sixth Circuit and the *voluntary* merger of the Louisville and Jefferson County districts, it was within the power and duty of the District Court to include all of the schools in Jefferson County in the desegregation plan if the Court concluded, as it did, that this was necessary, in order to eliminate effectively the racially identifiable character of the twenty-seven black schools in Louisville. The District Court accomplished the desegregation of these schools by clustering each of them with a number of white schools, and by providing wide tolerances in the black-white ratios, particularly at the elementary school level, it minimized the extent of busing that was required. In other words, the District Court did not attempt, as the Petitioner charges, to

eliminate the racially identifiable character of all of the schools in the Jefferson County school district. It attempted, as the Sixth Circuit specifically found in dismissing the Petitioner's appeal as unsubstantial, *to eliminate all the vestiges of state-imposed segregation in the school district,* and concentrated on the racially-identifiable black schools. In so doing, it also eliminated the racially-identifiable character of the white schools that were vestiges of state-imposed segregation, *e.g.*, the twenty-five pre-*Brown* white schools in the former Louisville district that had never changed their racial composition, the few post-*Brown* white schools that the Louisville district had constructed, and the white schools in the former Jefferson County district that would have been desegregated if that district had not been maintaining three schools as black schools.

In effect, what the Petitioner is complaining about is the inclusion of the white schools in Jefferson County in the desegregation plan. Their inclusion, however, was necessary in order to eliminate the racially identifiable character of the black schools in the former Louisville district, and was proper, both because the Sixth Circuit had held that under the *Milliken* guidelines, an inter-district remedy was appropriate and because at the time the desegregation plan was imposed, the former Louisville district was now a part of the Jefferson County district so it was then an intra-district remedy. It clearly was within the discretion of the District Court to include all of the county's white schools the desegregation plan when it concluded that

this was necessary in order to eliminate effectively the racially identifiable character of the black schools.

What the Petitioner seems to be arguing is that county-wide desegregation cannot be ordered here because there was no proof in the case of county-wide segregatory intent. In so doing, he has completely confused or deliberately misstated the criteria for the remedying of *de jure* segregation in a school district located in a state where racial segregation was required by state law, and the criteria for remedying *de jure* segregation in a school district located in a state where racial segregation was not required by state law, but where the school district nonetheless was practicing *de jure* segregation. In the latter situation, the predicate for a finding of *de jure* segregation is proof of intent to segregate, *Keyes* v. *School District No. 1, Denver,* 413 U. S. 189 (1973), and in order for a system-wide remedy to be appropriate, it is necessary that the intent to segregate be shown to exist on a system-wide basis. *Dayton Board of Education* v. *Brinkman,* —— U. S. ——, 97 S. Ct. 2766 (1977). But in a school district located in a state where racial segregation was required by state law, the intent to segregate system-wide is not in issue: the intent to segregate system-wide is provided by state laws which require that *all* schools be racially segregated. It was pursuant to the laws of the State of Kentucky requiring racial segregation in *all* of the schools that the Jefferson County school district and the Louisville school district were administered, and it was pursuant to those laws that system-wide racial segregation was imposed in both districts.

Under *Swann,* all vestiges of state-imposed segregation had to be eliminated in Jefferson County, Kentucky, and that is precisely what the District Court's plan required.

Thus, the Petitioner's reliance on *Brinkman* and the other cases involving the establishment of *de jure* segregation under the intent to segregate criteria is completely misplaced and indeed frivolous. The Petitioner states that in these cases this Court has "once again made clear that the law does not require the elimination of all racially identifiable schools" (Supplemental Brief, p. 6), which is true. He also states that, "even in a system which has once practiced segregation by law, such schools are not necessarily a vestige of state-imposed segregation if, in fact, they were not caused by it" (*Id.*), which is also true. What the Petitioner fails to understand, however, is this Court's holding in *Swann* to the effect that where racially identifiable schools do exist in a system located in a state where racial segregation was required by state law, the burden is on the school board to show that their racially identifiable character is not the result of past or present racial discrimination. Failing or refusing to understand this, he also fails to realize that in the case at bar, the racially identifiable character of the black schools in the former Jefferson County and the former Louisville school districts were found to constitute vestiges of state-imposed segregation, precisely because no such showing was or could have been made. This being so, their racially identifiable character was required to be eliminated, as was done under the District Court's plan.

The most absurd contention of the Petitioner is the contention that proof should be taken on "whether or not the admitted racial identifiability of certain schools is in any way a result or increment of any impermissible state action." (Supplemental Brief, p. 11). This question was answered definitively some four years previously when the case was first before the Sixth Circuit. The impermissible state action that resulted in the admitted racial identifiability of some 30 schools in Jefferson County, Kentucky, was the law of Kentucky requiring racial segregation in the schools, pursuant to which racially identifiable black schools were established by the Jefferson County and the Louisville school districts, and the actions of those districts, not only in failing to carry out their constitutional duty to desegregate those schools, but in creating more racially identifiable black schools at a time when they were maintaining a constitutionally impermissible dual school system.

The District Court's desegregation plan successfully eliminated all vestiges of state-imposed segregation in Jefferson County, Kentucky. It conforms to the criteria established by this Court in *Swann*. Above all, it has worked. In Jefferson County, Kentucky, today, there are no black schools or white schools, just schools attended by children of both races. *Green* v. *County School Board of New Kent County*, 391 U. S. 430, 442 (1968). There is no basis whatsoever for this Court, in the exercise of its discretionary jurisdiction on certiorari, to review the validity of that plan on the ground that it orders "too much desegregation."

CONCLUSION

For the reasons stated herein, it is respectfully submitted that the Petition for a writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of September 1977, three copies of the Response to a Petition for a Writ of Certiorari were personally served on: J. Bruce Miller, 1122 Kentucky Home Life Building, Louisville; Ben J. Talbott, 501 South Second Street, Louisville, Kentucky; Will H. Fulton, 1st National Tower, Louisville, Kentucky, said counsel representing the parties required to be served, and said service having conformed to the requirements of Rule 21(1) and Rule 23 of the Supreme Court rules.

THOMAS L. HOGAN